Supreme Court, U.S.
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No. 10-14

IN THE

Supreme Court of the United States

PROFESSIONAL MEDICAL EDUCATION, INC.,

Petitioner,

v.

PALM BEACH COUNTY HEALTH CARE DISTRICT and JEFF DAVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the petitioner's due process and equal protection claims have been preserved in the courts below.

II. Whether, contrary to the petitioner's representation in the Petition for Writ of Certiorari, a Florida state court has "insulate[d] a government tortfeasor from liability by application of a judicial doctrine (sovereign immunity), despite legislative action that has clearly waived sovereign immunity for negligence and intentional tort claims."

III. Whether the Petition for Writ of Certiorari and its Appendix set forth an arguable claim that a Florida state court has violated the due process and equal protection rights of the petitioner, and thus whether they set forth a basis for federal jurisdiction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. THE PETITIONER'S ARGUMENTS WERE NOT PRESERVED.	6
A. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE SUPREME COURT OF FLORIDA.	6
B. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE FOURTH DCA OR THE TRIAL COURT.	7
II. ON THE FACE OF THE APPENDIX IT IS PLAIN THAT THE PETITIONER'S ARGUMENTS HAVE NO MERIT.	8
A. THE ABSOLUTE PRIVILEGE OF *McNAYR* IS NOT SOVEREIGN IMMUNITY.	8

Contents

Page

B. THERE IS NO MERIT TO THE PETITIONER'S ARGUMENT THAT THE FOURTH DCA'S DECISION WAS SECRETLY BASED ON SOVEREIGN IMMUNITY OR VIOLATED THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY. 11

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Page

Cases

Barr v. Matteo,
360 U.S. 564 (1959) 8, 9, 14

Bauer v. City of Gulfport,
195 So. 2d 571 (Fla. 2d DCA 1967) 10

City of Miami v. Wardlow,
403 So. 2d 414 (Fla. 1981) 12

City of Stuart v. Monds,
10 So. 3d 1134, *rev. denied*, 23 So. 3d 712
(Fla. 2009) 4

Commercial Carrier Corp. v. Indian River County,
371 So. 2d 1010 (Fla. 1979) 11

Crowder v. Barbati,
987 So. 2d 166 (Fla. 4th DCA 2008) 12

Densmore v. City of Boca Raton,
368 So. 2d 945 (Fla. 4th DCA 1979) 13

Goetz v. Noble,
652 So. 2d 1203 (Fla. 4th DCA 1995) 12

Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) 9

Cited Authorities

Page

Kribs v. City of Boynton Beach,
372 So. 2d 195 (Fla. 4th DCA 1979) 12-13

McNayr v. Kelly,
184 So. 2d 428 (Fla. 1966) ..... *passim*

Medina v. City of Hialeah,
No. 02-20957-CIV, 2003 U.S. Dist. LEXIS 4890
(S.D. Fla. Mar. 20, 2003) 10

Murphy v. City of Aventura,
No. 08-20603-CIV, 2008 U.S. Dist. LEXIS
80647 (S.D. Fla. Oct. 10, 2008) 10

Palm Beach County Health Care Dist. v.
Prof. Med. Educ., Inc.,
13 So. 3d 1090 (Fla. 4th DCA 2009),
rev. denied, 34 So. 3d 2 (Fla. March 30, 2010)
..... 2, 8, 10, 12

Saxon v. Knowles,
185 So. 2d 194 (Fla. 4th DCA 1996) 10

Skoblow v. Ameri-Manage, Inc.,
483 So. 2d 809 (Fla. 3d DCA 1983) 13

Cited Authorities

Page

United States Constitution

Fifth Amendment 6

Fourteenth Amendment 6

Florida Constitution

Fla. Const. Art. 5, § 3(b)(3) 7

Fla. Const. Art. 5, § 4(b)(1) 7

Rules

Fla. R. App. P. 9.030(a)(2)(A)(ii) 7

Fla. R. App. P. 9.030(a)(2)(A)(iv) 7

Fla. R. App. P. 9.030(b)(1)(A) 7

U.S. Supreme Court Rule 14.1.(g)(i) 6

STATEMENT OF THE CASE

The Statement of the Case in the Petition for Writ of Certiorari contains many erroneous statements. Their falsity is apparent on the face of the documents in the Appendix. This Statement of the Case will show that the petitioner's basic premises are without factual merit and the "Questions Presented" by the petitioner are not valid questions as a result.

The petitioner, Professional Medical Education, Inc. ("PME"), sued the respondents, the Palm Beach County Health Care District (the "District") and its Trauma Agency Director, Dr. Jeff Davis, under state law for defamation; tortious interference with PME's business relations; and conspiracy to commit those two torts. App. 1-2.

At the conclusion of the trial, the trial court found no jury issue as to whether Davis acted at all times within the scope of his employment, and granted a directed verdict for Davis. The trial court entered a judgment for Davis on all claims based on "absolute immunity under *McNayr v. Kelly*, 184 So. 2d 428, 433 (Fla. 1966)."[1] App. 5.

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1. Throughout the trial and appellate proceedings the parties argued about whether the absolute privilege would preclude a judgment against Davis on the tortious interference count or solely on the defamation count. The Fourth District Court of Appeal's decision mooted this argument by holding, as the defendants had always argued, that the tortious interference count could not survive for other reasons. App. 5-10.

The trial court rejected the District's argument that if Davis was protected by the *McNayr* immunity, it necessarily followed that no judgment could be rendered against the District, which was sued only vicariously. App. 10, 20. The jury rendered a verdict against the District, App. 26-31, and the trial court rendered a judgment based on the jury's verdict. App. 12-13.

The District appealed the judgment to the District Court of Appeal of Florida ("DCA"), Fourth District, which reversed the judgment and remanded for the entry of a judgment in favor of the District. App. 1-11; *Palm Beach County Health Care Dist. v. Prof. Med. Educ., Inc.*, 13 So. 3d 1090 (Fla. 4th DCA 2009), *rev. denied*, 34 So. 3d 2 (Fla. March 30, 2010). The Fourth DCA held (1) the evidence could not support a judgment for tortious interference, for reasons related solely to state tort law, App. 5-10; (2) the trial court erred in denying the District the benefit of the absolute immunity from the defamation claim under *McNayr*, given that the allegedly defamatory statements were within the absolute privilege or immunity from defamation claims, App. 10-11; and, since neither of the tort claims could survive, (3) there was no underlying tort to support the conspiracy count and no other basis for an award of damages. App. 1-2, 11.

In this Court, the petitioner wrongly argues that the reversal of the judgment was based entirely on "sovereign immunity." In this argument, the petitioner actually attacks only one of the Fourth DCA's holdings: That if the absolute privilege from defamation claims applies to the respondent Davis, it necessarily follows that the District, sued vicariously as his employer, could

not be held liable. This ruling does not implicate sovereign immunity at all. It is based on the state law *McNayr* immunity, coupled with state law principles of vicarious liability.

The petitioner cross-appealed the separate final judgment in favor of Davis to the Fourth DCA, which affirmed the judgment in favor of Davis without comment. The petitioner does not seek review in this Court of the final judgment in favor of Davis; it is not even in the Appendix. Thus, the petitioner does not dispute the holding that the absolute immunity applied to Davis, but only the holding that it precluded a judgment against the District.

Neither does the petitioner seek certiorari based on the Fourth DCA's holding, App. 4-10, that the petitioner failed, as a matter of state law, to prove its claim for tortious interference with its business relationships; nor the Fourth DCA's holding, App. 1-2, 11, that the "conspiracy" count failed because the other two counts failed. It is therefore absurd for the petitioner to seek, as it does, Petition at 32-33, for this Court to reinstate the jury's verdict. A decision in favor of the petitioner on the federal arguments (which do not in fact raise federal claims) would mean the case would have to be remanded for reconsideration of how the other issues would be resolved in light of this Court's holding on the federal arguments. Moreover, the respondents made a number of other arguments below as to why the jury's verdict could not stand, and the Fourth DCA did not need to reach all of them. A decision of this Court that the "absolute privilege" was wrongly applied would mean the Fourth DCA might have to reach the other arguments.

The petitioner asserts "a panel of the Fourth District held that ***all*** of [p]etitioner's claims were barred by the doctrine of 'absolute immunity,' " Petition at 5 (emphasis in original), and that both the tortious interference and defamation claims were "barred by 'absolute immunity,' " Petition at 21, n.14. That is not so. In six pages of analysis devoted solely to the insufficiency of the evidence as to the tortious interference claim, App. 4-10, Chief Judge Gross, writing for a unanimous three-judge panel, made perfectly clear that the court's decision on that count had nothing to do with the absolute privilege.

Along the same lines, the petitioner asserts that the Fourth DCA stated that the tortious interference count was "barred by the doctrine of absolute immunity, based on another Fourth District case expanding this doctrine to tortious interference claims. *See City of Stuart v. Monds*, 10 So. 3d 1134, *rev. denied*, 23 So. 3d 712 (Fla. 2009)." Petition at 10-11 n.6. In fact, however, the Fourth DCA's decision carefully avoided relying on or endorsing *Monds*, saying in a footnote: "We note that another panel of this court recently applied the doctrine of absolute immunity to bar an action for tortious interference with an advantageous business relationship against a City and its employees [citing *Monds*] . . . This would be a separate ground supporting a judgment for the District on the tortious interference count." App. 10-11 n.2.

REASONS FOR DENYING THE PETITION

The petition should be denied because it fails to set forth any indication that any of the putative federal claims were preserved in the courts below. In fact, they had never been made until the Petition for Writ of Certiorari was filed.

On the merits, it would be an understatement to say the Petition for Writ of Certiorari should be denied because there are no "compelling reasons" for it to be granted. In fact, the Appendix fails to support the existence of a federal claim or any fairly debatable jurisdictional basis for certiorari to be granted.

The Appendix shows that the basic premise of the petition is untrue. The Fourth DCA did not "refuse to follow its own legislative waiver of sovereign immunity to defeat the claims of a party which prevailed at trial." Petition at 8. Neither did the court, "by judicial fiat, abrogate statutory law that waives sovereign immunity for claims against the State and its subdivisions." *Id.*

In the table of "Questions Presented," the petition asks: "Can a State of Florida insulate a government tortfeasor from liability by application of a judicial doctrine (sovereign immunity), despite legislative action that has clearly waived sovereign immunity for negligence and intentional tort claims?" The Appendix shows that the Fourth DCA did not apply sovereign immunity, nor offend Florida's statutory waiver of sovereign immunity.

I. THE PETITIONER'S ARGUMENTS WERE NOT PRESERVED.

The petition should be denied because it fails to comply with this Court's Rule 14.1.(g)(i). It fails to state:

> when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

In fact, the due process and equal protection arguments made in the petition were not raised in any court below, or ruled upon.

A. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE SUPREME COURT OF FLORIDA.

Petitioner unsuccessfully sought discretionary review in the Supreme Court of Florida of the Fourth DCA's decision. Petitioner's jurisdictional brief in the Supreme Court of Florida made no reference to the Fifth or Fourteenth Amendments to the United States Constitution or to the substance of the due process and equal protection claims made here.

Under the Florida constitution, the Supreme Court of Florida's discretionary jurisdiction to review a DCA decision is limited. One category of discretionary review is from a DCA decision that "expressly construes a provision of the state or federal constitution." *See* Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). Petitioner did not seek review on this basis.

Instead, the petitioner sought review in the Supreme Court of Florida under the category of discretionary review applicable to a DCA decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *See* Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). All of the petitioner's arguments flowed from one premise: Where the Fourth DCA's decision found that, under the evidence, the respondents were entitled to a judgment as a matter of law, the petitioner argued that the questions were resolved by the jury and the trial court's final judgment should have been affirmed based on the jury's verdict.

B. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE FOURTH DCA OR THE TRIAL COURT.

Neither were the petitioner's due process and equal protection claims preserved in the intermediate appellate court, which had mandatory, plenary jurisdiction to review the final judgment of the trial court. *See* Art. 5, § 4(b)(1); Fla. R. App. P. 9.030(b)(1)(A). The petitioner did not cite a single state or federal constitutional provision or decision of this Court in the

Fourth DCA. The petitioner made none of the federal claims now set forth in the Petition for Writ of Certiorari to this Court. Of course, these claims were not ruled upon. *See Palm Beach County Health Care Dist.*, App. 1-11. Finally, if the record is ordered, it will show that the petitioner failed to preserve in the trial court the arguments now made here.

II. ON THE FACE OF THE APPENDIX IT IS PLAIN THAT THE PETITIONER'S ARGUMENTS HAVE NO MERIT.

The petitioner's arguments flow from the premise that the Fourth DCA applied sovereign immunity in its decision to vacate the trial court's judgment against the District. It is apparent on the face of the Fourth DCA's opinion that this premise is false.

A. THE ABSOLUTE PRIVILEGE OF *McNAYR* IS NOT SOVEREIGN IMMUNITY.

In *Barr v. Matteo*, 360 U.S. 564 (1959), this Court held that the same "absolute privilege" from defamation actions extended to officers of the judicial and legislative branches should similarly extend to officers of the executive branch, *id.* at 569-573, even those "below cabinet rank." *Id.* at 572. The privilege is "absolute" inasmuch as it is not overcome by a showing of malice. *Id.* at 569. Under *Barr*, the absolute privilege would apply to an officer "of lower rank in the executive hierarchy" so long as the allegedly defamatory statement pertained to "matters committed by law to his control or supervision." *Id.* at 573 (internal quotation marks omitted).

Following suit seven years later, the Supreme Court of Florida adopted the same principle as a matter of Florida law in *McNayr*. *McNayr* borrowed from *Barr* in its analysis, and, like *Barr*, quoted from Judge Learned Hand's decision in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), to explain its rationale. *McNayr*, 184 So. 2d at 431 n.12; *Barr*, 360 U.S. at 571-72. *Barr* and *McNayr* were not based on sovereign immunity. Moreover, Florida's decision to follow *Barr* with respect to officers of the State of Florida was not compelled by any federal rule. The reasoning of *Barr* was adopted as a matter of the Florida common law of torts.

Confusing the absolute privilege with sovereign immunity, the petition calls the absolute privilege a "dubiously resurrected judicial immunity," Petition at 21, that is "idiosyncratic," at 8, and of "questionable pedigree," at 9. To the contrary, *McNayr* is the progeny of Judge Hand's opinion in *Gregoire* and this Court's holding in *Barr*.

In the particular holding now under attack in this Court, the Fourth DCA applied the well-established Florida absolute privilege as it has been applied and refined in cases since *McNayr*. Again and again, on motions to dismiss, for summary judgment, for involuntary dismissal at the close of the plaintiff's case, and in post-trial motions, the respondents argued that they were protected from liability for defamation — and indeed from having to defend the defamation claim — by the absolute privilege of *McNayr*. The privilege was never confused with "sovereign immunity" in any argument below, or by any lower court.

The trial court applied the absolute privilege to protect Davis from liability for defamation, but the trial court held that the absolute privilege did not protect the District. On this point the Fourth DCA reversed, and only on this aspect of the Fourth DCA's decision does the petitioner seek certiorari in this Court. The petitioner's argument that the very notion of state sovereign immunity is inherently contrary to the Due Process and Equal Protection Clauses — a truly astounding proposition — need not be addressed, for the ruling at issue was not grounded in sovereign immunity.

On its face, the Fourth DCA's decision was grounded in the law of vicarious liability:

> Because the liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis 'necessarily requires the exoneration' of the District. *Saxon v. Knowles*, 185 So. 2d 194, 196 (Fla. 4th DCA 1996); *see Bauer v. City of Gulfport*, 195 So. 2d 571, 573 (Fla. 2d DCA 1967); *Murphy v. City of Aventura*, No. 08-20603-CIV, slip op. at 5 n.3, 2008 WL 4540055 (S.D. Fla. Oct. 10, 2008); *Medina v. City of Hialeah*, No. 02-20957-CIV, 2003 WL 1562281 (S.D. Fla. Mar. 24, 2003).

App. 10; *Palm Beach County Health Care Dist.*, 13 So. 3d at 1095-96. All of the cited cases demonstrated that if a government employee's conduct was within the absolute privilege, the government agency could not be liable.

The petitioner cites to one of the leading Florida cases on the state's sovereign immunity law, *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), and quotes from its first footnote: "We do not deal here with personal immunity of individual officers acting in their official capacity. This distinct principle of law is explored in cases such as *McNayr*." *Commercial Carrier*, 371 So. 2d at 1012 n.1, quoted in Petition at 27. In this footnote, the Supreme Court of Florida was distinguishing the entire subject of sovereign immunity from that of the absolute privilege. There is no merit to the petitioner's effort to suggest that this footnote supports its position.

In sum, the absolute privilege is not sovereign immunity.

B. THERE IS NO MERIT TO THE PETITIONER'S ARGUMENT THAT THE FOURTH DCA'S DECISION WAS SECRETLY BASED ON SOVEREIGN IMMUNITY OR VIOLATED THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY.

The petitioner argues that in the Fourth DCA's decision, sovereign immunity was merely masquerading as the absolute privilege, saying: "Chief Judge Gross has erroneously combined the doctrine of absolute privilege, not applicable to our facts, with the doctrine of sovereign immunity, resulting in a newly created shield which he called 'absolute immunity.' " Petition at 13. Later the petitioner says the Fourth DCA's decision relies on sovereign immunity and "calls it by a different name, 'absolute immunity.' . . . conflating the two distinct

legal doctrines that serve different purposes into a hybrid that serves neither." Petition at 10. These statements — supported by no authority — are the only argument the petitioner makes to support a conclusion that the Fourth DCA's decision on the absolute privilege was secretly based on sovereign immunity. Of course, there is no merit to this argument.

The Fourth DCA was perfectly clear in basing its decision on the absolute privilege of *McNayr*. App. 10-11, *Palm Beach County Health Care Dist.*, 13 So. 3d at 1095-96 ("On the defamation count, the circuit court properly granted Davis's motion for directed verdict under *McNayr*. . . . Davis was acting within the orbit of his duties and responsibilities when he wrote the February 23, 2000 letter."). The petitioner bases its entire contention on Judge Gross's use of the words "absolute immunity" interchangeably with the words "absolute privilege," as if the petitioner has unearthed a meaningful Freudian slip.

The petitioner is apparently unaware that Florida courts routinely interchange the terms "absolute privilege" and "absolute immunity" in reference to the immunity afforded to executive branch officials in defamation cases. *See, e.g., City of Miami v. Wardlow*, 403 So. 2d 414, 415 (Fla. 1981) ("It has long been clear that a high-ranking officer of the executive branch of the national government, in explaining to the public the reasons for a decision or policy, enjoys *absolute immunity* from suit for libel. *Barr*.") (emphasis added); *Crowder v. Barbati*, 987 So. 2d 166, 167 (Fla. 4th DCA 2008); *Goetz v. Noble*, 652 So. 2d 1203, 1204 (Fla. 4th DCA 1995); *Kribs v. City of Boynton Beach*, 372 So. 2d

195, 195 (Fla. 4th DCA 1979) ("In *McNayr*, . . . our [s]upreme [c]ourt gave *absolute immunity* to executive officials with respect to defamatory publications made in the performance of their official duties.") (emphasis added); *Densmore v. City of Boca Raton*, 368 So. 2d 945, 947 (Fla. 4th DCA 1979) ("In the landmark decision of *McNayr* . . . our [s]upreme [c]ourt extended the doctrine of *absolute immunity* from liability to executive officials with respect to defamatory publications made in connection with the performance of their official duties.") (emphasis added). In *Skoblow v. Ameri-Manage, Inc.*, 483 So. 2d 809 (Fla. 3d DCA 1983), the court said:

> In *McNayr* . . . the supreme court first recognized an executive official's *absolute immunity* from defamation actions based on statements made in connection with the performance of his duties and responsibilities. The court recognized that executive officials had the same *absolute immunity* afforded members of the judicial and legislative branches of government. 184 So.2d at 433.

Skoblow, 483 So. 2d at 810 (emphasis added). Even the seminal cases on the absolute privilege routinely called it an "immunity" from defamation suits:

> This Court early held that judges of courts of superior or general authority are *absolutely privileged* as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those

> acts are alleged to have been performed . . . and that a like *immunity* extends to other officers of government whose duties are related to the judicial process.

Barr, 360 U.S. at 569 (citations omitted, emphasis added). *See also Barr*, 360 U.S. at 574 (holding that the scope of the executive branch officer's duties "must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with *immunity* from civil defamation suits") (emphasis added); *McNayr*, 184 So. 2d at 429 ("The question here . . . is whether the same *immunity* [as that extended to the judicial and legislative branches] should be extended to the executive branch of government. We think it should.") (emphasis added); *McNayr*, 184 So. 2d at 431 ("The question . . . of *absolute immunity* to those engaged in the executive branches of government is one of somewhat modern origin.") (emphasis added).

In sum, there is no basis in fact for the petitioner to assert that the Fourth DCA's ruling on the absolute privilege issue was really a sovereign immunity decision in disguise.

CONCLUSION

In applying the *McNayr* immunity, the Fourth DCA did not violate due process by creating a new doctrine, resurrecting an ancient doctrine, or overriding Florida's statutory waiver of sovereign immunity. The *McNayr* immunity does not violate PME's equal protection rights because in suing Davis and the District for defamation, PME is not similarly situated to those whose defamation actions are brought against defendants who are not within the *McNayr* immunity.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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